Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER, MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN, DAVE TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

APPELLANTS' BRIEF

ARTHUR GARFIELD HAYS,
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CASES CITED

STATUTES AND AUTHORITIES

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Opinions Below

Three opinions have been written in this case. At Special Term Mr. Justice Hearn accepted the contentions advanced by plaintiffs, appellants here, that the challenged laws and regulations violated the due process clause of the Fourteenth Amendment. That opinion is reported in 196 Misc. (N. Y.) 873.

In the Appellate Division, where the judgment in favor of plaintiffs was reversed, and their complaint dismissed, an opinion was written by Mr. Justice Cairswell. It is reported in 276 App. Div. (N. Y.) 527. In the Court of Appeals, which affirmed the judgment of dismissal, the opinion was written by Judge Lewis. It is reported in 301 N. Y. 476.

Statement of Jurisdiction.

This Court has jurisdiction under Title 28 U. S. C. § 1257, this being an appeal from a final judgment of the

highest court of a state which has upheld a statute against a challenge that it was repugnant to the United States Constitution. The decision was rendered on November 30, 1950 (54). Application for appeal was presented on January 16, 1951. It was allowed on January 17, 1951 (72). This Court noted probable jurisdiction on June 4, 1951 (75).

The Statutes Involved

Appellants challenge the so-called Feinberg Law, Chapter 360 of the Laws of 1949 of New York, which enacted Education Law § 3022 and which implemented Education Law § 3021 and Civil Service Law § 12a, and also the rules of the Board of Regents adopted in accordance with the Feinberg Law. All of these statutes and rules, as well as a memorandum by the Commissioner of Education interpreting them, were set forth in full as exhibits annexed to the complaint herein (20-33). The essential portions are reprinted as Appendix A to this brief.

Statement of the Case

The issues in this case were presented to the state court by a motion for judgment on the pleadings made by plaintiffs (4, 5). The pleadings consisted of a complaint (5-19) and an answer (33-35). The complaint sought a declaration that Chapter 360 of the Laws of 1949, commonly known as the Feinberg Law, was unconstitutional and that the rules prepared to implement it and Civil Service Law § 12a, as so implemented, were likewise unconstitutional (19).

The action was originally brought by various groups of plaintiffs, the Teachers Union, individuals who were only teachers and others who were both teachers and taxpayers, as well as some who were parents and others who were connected with various organizations (5-8). At Special

Term the complaint was dismissed as to all those who were not taxpayers (35-37). It survives in this Court, therefore, only as to those plaintiffs-taxpayers whose names are set forth in the caption.

The complaint attacks the laws and the regulations issued thereunder as violating the Fourteenth Amendment to the United States Constitution in various respects (12-18).

This case was one of three brought by various persons to test the law. The Court of Appeals wrote a single opinion covering all the cases, in which it expressly passed upon and rejected the contention of plaintiffs in this case that the statute denied due process under the Fourteenth Amendment (61-68).

The opinion of the Court of Appeals thus construed the statute to permit the Board of Regents to promulgate lists of allegedly subversive organizations and permit the educational authorities on the basis of such lists to declare employees in the educational system (both teachers and non-teachers) to be prima facie disqualified from continuing to hold their positions merely because of membership in any such organizations.

Questions Presented

1. The statutes and the regulations issued thereunder have the effect of disqualifying persons from employment as teachers or from other employment in connection with the educational facilities of the state and its subdivisions merely because of membership in an organization alleged to be subversive. In so doing they interfere with freedom of speech and of assembly guaranteed to all persons against state action by the due process clause of the Fourteenth Amendment.

2. The statutes and the regulations issued thereunder create an unreasonable presumption which denies due

process of law as guaranteed by the Fourteenth Amendment.

3. The statutes and the regulations issued thereunder violate the due process clause of the Fourteenth Amendment because of their vagueness.

Specification of Error

The New York Court of Appeals erred in affirming the judgment dismissing plaintiffs' complaint and in affirming the reversal of the judgment in plaintiffs' favor.

ARGUMENT

POINT I

The laws and regulations issued thereunder constitute an abridgement of freedom of speech and of assembly.

At the outset we must challenge the suggestion of the Court below (62) that constitutional rights of free speech may be abridged as a condition of public employment. In support of that statement Judge Lewis cited, among other authorities, the old dictum of Mr. Justice Holmes while on the Supreme Judicial Court of Massachusetts (*McAuliffe* v. *Mayor,* 155 Mass. 216 at 220) and the recent decision of this Court in *United Public Workers* v. *Mitchell* (330 U. S. 75). Neither case is here pertinent, since neither dealt with expression of opinion or the right of association. Both dealt with partisan political activities alone.

Moreover, in *United States* v. *Thayer,* 209 U. S. 39, Mr. Justice Holmes indicated that his earlier statement was not to be taken literally. For he pointed out (209 U. S. at 42) that even officeholders might have constitutional rights the legislature could not restrict. And in the *Mit-*

chell case the majority opinion recognized that government employees could not be deprived of all freedom of activity (330 U. S. at 100).

In *United States* v. *Lovett*, 328 U. S. 303, government employees were held entitled to the protection of the prohibition against bills of attainder. And in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, Justices Black, Douglas, Jackson and Frankfurter, in their various concurring opinions, recognized that the Constitution imposes some limitations on the power of Congress even when dealing with government employees. This point of view has perhaps been most eloquently expressed by Judge Edgerton in his dissent in *Bailey* v. *Richardson*, 182 F. (2d) 46, 66 ff (here affirmed by an evenly divided court, 341 U. S. 918).

Finally, in *Garner* v. *Los Angeles*, 341 U. S. 716 at 725, Mr. Justice Frankfurter expressly stated the problem as follows:

> "But it does not at all follow that because the Constitution does not guarantee a right to public employment, a city or a State may resort to any scheme for keeping people out of such employment. Law cannot reach every discrimination in practice. But doubtless unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge. Surely, a government could not exclude from public employment members of a minority group merely because they are odious to the majority, nor restrict such employment, say, to native-born citizens. To describe public employment as a privilege does not meet the problem."

So, here, this Court must look at the objectives of the challenged legislation and its impact on freedom. The question in each case is whether the restriction imposed on government employees has reasonable relation to the public service, or constitutes an improper interference with fundamental rights. New York's old provision, Civil Service Law § 12a, which disqualifies employees who belong to

organizations which in fact advocate the overthrow of the government by force, is of the character of the charter amendment held valid in the *Garner* case. But the new legislation here under attack is of an entirely different character.

For Education Law § 3022 (31, 32) and the regulations issued by the Board of Regents necessarily restrict the liberties of all persons in the teaching service (22-25). The regulations in effect command all such persons to sever relations with any organization listed by the Regents within ten days on pain of loss of position (23, 24). And this, regardless of the correctness of the list, of the pendency of judicial proceedings to review a particular listing. And it is no answer to say that if the Regents should be overruled in some instances, persons who were members of such organizations would not be penalized. The risk they run is too great to condone the interference with freedom of association.

Aside from this particular incidence of the regulations, there can be no doubt of the restrictive effect of the entire scheme on our cherished liberties. Such attempts at restriction are, of course, not new in our national life. After the First World War fear of the then recent Soviet Revolution led to the enactment of similar legislation, known as the Lusk Laws (Laws of 1921, Ch. 666). So eminent a patriot as Alfred E. Smith had vetoed this legislation when first passed in 1920. And he led the fight for repeal a few years later. He said as he signed the repealer:

> "The Lusk Laws * * * are repugnant to the fundamentals of American Democracy * * *. Teachers, in order to exercise their honorable calling, were in effect compelled to hold opinions as to governmental matters deemed by the state officer consistent with loyalty * * *. Freedom of opinion and freedom of speech were by these laws unduly shackled and an unjust discrimination was made against the members of a great profession. In signing these bills I firmly believe I am vindicating the principle that within the limits of the penal law every citizen may speak and teach what

he believes" (School and Society, XVII [June 9, 1923], 635).

Similar consequences flow from the impact of the program devised by the new legislation on teachers generally as well as on particular individuals who might be brought up on charges. For laws such as these create fear and timidity wholly incompatible with the intellectual atmosphere in which teachers should live. They will become afraid to join movements or express views which might be challenged lest they be caught in the dragnet of the Regents' lists.

That this is no idle apprehension is established by the various surveys which have recently been made of the status of academic freedom. At about the time the Feinberg Law was enacted, The American Scholar published articles dealing with the situation which had developed at the University of Washington in the fall of 1948. Those by Max Lerner (pp. 337-320) and Helen M. Lynd (pp. 346-353) foretold the threats to freedom which later surveys have laid bare.

The New York Times this year instituted a survey of freedom of thought and speech in the colleges and reported that it was being "stifled by students' fear of red label" (N. Y. Times, May 10, 1951, pp. 1, 28; May 11, 1951, pp. 29, 48).

In its issue of June 19, 1951, The Harvard Crimson in its third annual report on the subject gave the details of 35 academic freedom cases which had arisen in various parts of the country. Later, the National Education Association, warning of growing censorship in the schools in an 86-page report, noted that teachers were afraid to teach almost any controversial subject (N. Y. Times, July 6, 1951, p. 25; cf. editorial, July 9, 1951). Pertinent excerpts from these various publications are included in Appendix B to this brief.

Mr. Justice Frankfurter has recognized the restrictive effect of regulations of the character here involved in the

Garner case, supra, where he said at pp. 727, 728, speaking there of an oath required of municipal employees that they had not belonged to organizations which advocated the overthrow of the Government by force:

> "• • • It is bound to operate as a real deterrent to people contemplating even innocent associations. How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'? All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout our history they have been manifested by 'joining'. See Arthur M. Schlesinger, Sr., Biography of a Nation of Joiners, published in 50 American Historical Review 1, reprinted in Schlesinger, Paths to the Present 23."

It is, of course, true that a majority of this Court upheld the power of Los Angeles to exact the oath there in question. But we submit that decision does not rule this case. This Court, indeed, must have so believed, else it would not have noted probable jurisdiction in this case on the same day that it decided the other.

The difference between the cases, we suggest, rests in this: In the Los Angeles case the employees were asked to certify that they had not *knowingly* (we stress this Court's interpolation of that condition into the oath) belonged to any organization which in fact advocated the overthrow of the government by force. Here employees are declared disqualified if they continue to belong to an organization which has merely been declared to have that character by an administrative body. In the other case persons were disqualified only if they actually belonged to such an organization and were aware of its character. Here the employees are bound to accept as true the char-

acterization of the organization by the Regents or, at their peril, prove that such characterization was false. There can be no comparison about the difference in impact on freedom of association.

We are, in effect, here dealing with machinery which is bound to create an atmosphere of intimidation and to interfere with the exercise of fundamental rights.

The issue is not whether Communists should be allowed to teach in the public schools, nor even whether persons who advocate the overthrow of the government by force should be allowed to teach—the old law (Civil Service Law § 12a) adequately takes care of such persons. The issue is whether lists should be promulgated of organizations which an administrative agency, without particular competence in that field, has declared advocate the overthrow of the government by force. The intimidatory impact of such listings has a double aspect. It not only directly affects the organizations listed but it causes persons in the school system to avoid contact with any groups whose ideas might conceivably lead to such listing. Such an interference with freedom of expression and association should be stricken down by this Court.

POINT II

The presumption created by the Feinberg Law is unreasonable and denies due process of law.

A legislature may not substitute a presumption for proof where there is no reasonable relation between the fact to be proved and the fact presumed: *Bailey* v. *Alabama*, 219 U. S. 219; *McFarland* v. *American Sugar Co.*, 241 U. S. 79; *Manley* v. *Georgia*, 279 U. S. 1; *Tot* v. *United States*, 319 U. S. 463; *Pollock* v. *Williams*, 322 U. S. 4. The rule applies to civil as well as criminal matters: *Mobile, Jackson & Kansas City RR.* v. *Turnipseed*, 219 U. S. 35.

Section 2 of the Feinberg Law (Education Law § 3022, subd. 2) declares that the disqualification specified by

Civil Service Law § 12a, subd. c shall be presumed by proof of membership in an organization placed by the Regents on a "subversive" list (31).

For such a presumption there is no rational basis. Under it a person is presumed disqualified for service in the educational system if he was at one time a member of an organization which the Regents may thereafter declare to be subversive, for the law makes no distinction between past and present membership. There is here no relation at all between the known fact—that is, membership, and the presumed fact—that is, disqualification for office. This is even worse than presumptions which have been struck down—as that of fraud from insolvency in the *Manley* case or of interstate transportation from possession in the *Tot* case.

The presumption here created is wholly unlike those upheld in *People* v. *Pieri*, 269 N. Y. 315, cited by the Appellate Division in this case, and in *People* v. *Farina*, 290 N. Y. 272, cited by the Appellate Division in the companion case (276 App. Div. at 509). In those cases the person charged had special opportunity to know the facts and the prosecution lacked such knowledge (see *Casey* v. *United States*, 276 U. S. 413 at 418). Moreover, there was a rational connection between the known fact (i.e., possession of contraband) and the presumed fact (i.e., illegal intent).

Here we have none of those elements. Surely the individual employee has no special knowledge of the character of an organization of which he is said to be a member which justifies putting the burden of going forward with the evidence on him, nor, as we have pointed out, is there any rational relation between the known fact of membership and the presumed fact of disqualification.

Moreover, in all of the cases in which presumption statutes have been upheld the facts which gave rise to the presumption were the subject of proof in the criminal proceeding. Here, however, the facts which give rise to the determination that the particular organization is sub-

versive are to be established in a proceeding in which the employee will have had no part whatever.

The arbitrary character of this presumption becomes clear when we consider the predicament of an accused employee. He has no way of knowing what considerations led the Regents to place on their "subversive" list the particular organization he is accused of having joined—and, under the regulations he must, at his peril, disaffiliate himself "in good faith" (whatever that means) within ten days after the promulgation of the list! Even if the Regents should hold a hearing such hearing is not only ex parte as to the employee, as pointed out at Special Term by Judge Hearn (45), but presumably secret as well.

How can an employee come forward with evidence to establish that the Regents were wrong? To impose such a burden on him violates all principles of fair play and is a denial of due process.

Moreover, if the accused person claims that he is not a member of the organization he is in a double dilemma. He may not want to risk all by resting only on a denial of membership. Yet he may be in no position to ascertain the facts with regard to the character of the organization with which he has been incorrectly linked. On the other hand familiarity with the character of the organization may be held against his denial of membership. Even where the employee may admit membership he may still be unable to obtain evidence which might clear the organization. The application of the presumption besets the accused's path with such uncertainty and complication that it must be stricken down.

The Appellate Division evidently attempted to save the presumption by interpreting the statute to require proof that the employee have knowledge of the "subversive" character of the organization (53). But even so, the presumption remains an unreasonable one. For what will actually happen under such an interpretation? Once an organization has been branded as "subversive" it will no doubt be argued that all persons who were members must

have known its character and objectives. Moreover, as the Appellate Division pointed out (52), the listing itself constitutes knowledge of the character of the organization and continuation of membership thus concludes the employee. Thus the case against him is created by the process of judicial lifting of bootstraps. The attempt to justify the presumption by this gloss on the statute is wholly illusory.

The only proper conclusion is that the presumption created by the statute is void. That being so, plaintiffs were entitled to an injunction to prevent all attempts at enforcement of the law.

POINT III

The law is void because of vagueness.

Education Law § 3022, in its first subdivision, requires the Regents to adopt rules for the disqualification of employees who violate § 3021. This latter section requires the removal of school employees "for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" (32). The Feinberg Law in its first section speaks also of "subversive" propaganda (30). And the Rules of the Regents are headed "Subversive Activities" (22).

The regulations issued by the Regents, in an endeavor to implement this provision, require annual reports in writing on every employee (including the supervisors themselves) to indicate whether there is any evidence that such employee has violated § 3021 (22).

The Commissioner of Education in a memorandum explaining these regulations (as appears from the copy attached to the complaint (25-29)) described "subversive activity" as including the utterance of "any treasonable or seditious word" and went on to say:

> "* * * It should be noted that this activity need not be merely by word of mouth. The writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed

by others all may constitute subversive activity. Nor need such activity be confined to the classroom. Treasonable or subversive acts or statements outside the school are as much a basis for dismissal as are similar activities in school or in the presence of school children" (27).

While the Commissioner sought to warn the school authorities against treating suggestions for improving our institutions as subversive, he made no attempt to define the words of the statute.

We submit these words are so vague that their use condemns the whole scheme on the score of vagueness (Cf. *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *New York*, 333 U. S. 507).

Neither the word "seditious" nor the word "treasonable" has acquired any such legal meaning as, for instance, the word "obscene"—or even the phrase "moral turpitude" (see *Jordan* v. *deGeorge*, 341 U. S. 223—but note the dissenting opinion of Mr. Justice Jackson, concurred in by Justices Black and Frankfurter).

Throughout history the epithets "seditious" and "subversive", have been hurled at those who challenged the established order. It was experience with prosecutions for "seditious" libel, both in England and in the Colonies (culminating in the great victory for freedom in Peter Zenger's case) which, in part, led to the adoption of the First Amendment.

And the vagueness of the term "treason" resulted in the precise definition contained in the Constitution (a definition obviously not carried over into the New York statute). As Madison recognized in Federalist Paper No. 42 (as quoted by Mr. Justice Black in the *Joint Anti-Fascist* case 341 U. S. 123, 144, note 2:

> "• • • But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governents, have usually wreaked their alternate malignity on each other, the Convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a Constitutional definition of the crime, fixing the proof neces-

sary for conviction of it, and restraining the Congress, even in punishing it from extending the consequences of guilt beyond the person of its author."

Prophetically, indeed, Mr. Justice Reed, in the *Winters* case, supra, at page 518, warned that a case might arise calling for decision "as to free expression of political views in the light of a statute intended to punish subversive activities".

Surely the educational authorities of New York should not be permitted to engage in witch hunts against teachers and other employees to label them as "seditious" or "treasonable" and subject them to the public obloquy which will result and require them to stand trial for an offense which is incapable of definition. Section 3021 and the new law, insofar as it rests on this older one, should be declared unconstitutional.

CONCLUSION

The most serious threat to our freedom today is the trend toward conformity resulting from the variety of pressures, both governmental and private, of which the legislation here under attack is one. The serious effects of these pressures on the teaching profession has, as we have shown, become alarming. While it is too much to hope that decisions of this Court alone can stop this disturbing trend, such decisions can, at least, mark bounds beyond which restrictions cannot go. Moreover, the opinions of this Court can help reshape the times. It has happened so before, it can happen again. Here is an opportunity to speak out in the name of freedom, to still the voices of fear that would repress. The judgment appealed from should be reversed and the judgment entered at Special Term reinstated.

Respectfully submitted

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APPENDIX A

CHAPTER 360, LAWS OF 1949

SECTION 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violent or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be vigorously enforced. The legislature de-

the Fourteenth) rests on the impact of the law on the many, not on its impact on the few. And that, after all, is the real reason for the First Amendment (see Chafee, Freedom of Speech in the United States, 33-35).

Of course, the Feinberg Law does not, by its language, restrict freedom of speech and of assembly. But it can hardly be doubted that it would do so were it to be allowed to become effective. That the promulgation of lists such as is here envisaged produces an atmosphere of fear that is hostile to freedom—indeed to security itself in its making public employment less attractive to persons of independent thinking—has been noted by almost all the writers on the subject (see Gellhorn, Security, Loyalty & Science; Biddle, The Fear of Freedom; Civil Liberties Under Attack).

This is the first time this Court has been called upon to meet this issue, for in all the earlier cases the Court was concerned only with the impact of the challenged law or regulation upon a particular individual or organization. Fortunately New York has a practice whereby a taxpayer may challenge a law involving the expenditure of monies on constitutional grounds, regardless of its direct effect upon him. So this Court has an opportunity of dispelling the mists of fear that have enshrouded us. To strike down the Feinberg Law will in no way prevent dismissal of teachers who really are disqualified; it will prevent one more attempt to intimidate a large group of public servants into orthodoxy.

2. In discussing the fairness of the procedures set up under the Feinberg Law, appellee, we submit, has reached some strange conclusions.

a. In the first place, appellee maintains (p. 24) that listing by the Board of Regents was a necessary step because of the difficulty involved in having the several thousand school districts of the state ascertain the character of the organizations which might come within the definition of the law. With that argument we have some

sympathy. It would justify an arrangement whereby some central agency might make the necessary investigation and provide a school board with the data on which to base charges of disqualification. It does not justify the creation of any presumption. Indeed, the very argument made by appellee as to the difficulty confronting the local school board destroys the argument later made (p. 26) that the presumption is fair because it disappears if the employee submits "substantial" evidence that the organization is not of the character condemned by the law. Why the individual teacher is supposed to be able to do what the local board cannot is hard to fathom.

b. Appellee criticizes our comments on the procedures by suggesting (p. 27) that the evidence presented at the public hearing before the Regents may be studied as a basis for each individual's judgment whether to remain a member or resign. But if the Board continues in the manner in which it began there will be nothing to study. For on that occasion, while the Board gave the representatives of certain organizations an opportunity to submit affidavits, file briefs and give oral argument, no "evidence" as to the "subversive" character of any of the organizations was submitted other than a statement that the Attorney General had listed them as subversive within the definition of the law (see Jurisdictional Statement in No. 312, pp. 9, 10, 18, 19). We submit that it is still true that an employee has no way of knowing what considerations led the Board to list the particular organization (see main brief, p. 11).

Both appellee (pp. 10, 27) and amicus (A. G. p. 12) stress the supposed right of an organization listed by the Regents to review their determination in a proceeding under Article 78 of the New York Civil Practice Act. But such review cannot deal with the basic issue—the character of the organization. If there is conflict in the evidence, the administrative determination cannot be reviewed by the courts: *Matter of Miller* v. *Kling*, 291 N. Y. 65; *Matter*

of Tompkins v. *Board of Regents*, 299 N. Y. 469; *Matter of Joseph Burstyn, Inc.* v. *Wilson*, 303 N. Y. 242.

c. Appellee (pp. 28-33) tries to justify the presumption provision of the statute by breaking it into two parts: 1. The character of the organization; 2. The employee's knowledge of that character. Actually the attempted analysis demonstrates what a hollow sham the presumption is.

A difficulty, however, with appellee's argument on the first aspect of the "presumption" is that in the instances cited (pp. 29, 30) the administrative determination was made by experts with regard to matters within their competence and which did not impinge on freedom of expression. Here we have a statute giving the Board of Regents power to pass on something having nothing to do with matters of educational policy concerning which they are supposed to be experts, and something which closely impinges on freedom of expression—an "evil type of censorship" (see Mr. Justice Black, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. at 143).

But even if we assume that it is proper to permit the finding of the Board of Regents as to the character of the organization in question to be prima facie evidence thereof (which is a rule of evidence, rather than a presumption), it is quite another matter to say that knowledge of that character can be imputed merely because of membership.

Appellee (pp. 31-33) suggests that a person capable of being a teacher should be aware of the purposes of an organization he belongs to. Of course he should. But if there is room for difference of opinion concerning that purpose, is a teacher to be burdened with a harsh presumption because in fact he believes the purpose to have been innocent, rather than guilty? Actually, of course, the presumption provision of the law is designed to compel acceptance by the individual employees of the administrative findings and resign within the ten-day grace period (see comment, pp. 13, 27, 32). What it comes down to is this:

An employee who accepts that finding and resigns can be said to have knowledge of the improper character of the organization but as to him the presumption has no effect. An employee who believes that the determination was wrong, who still believes in the innocence of his organization and refuses to resign, he is presumed to have known all along that the organization was guilty! Can a presumption reach greater heights of absurdity?

3. a. Appellee argues (pp. 34-37) that the issue of vagueness is not "ripe for decision" because it was not discussed by the New York Court of Appeals. But that is not the fault of those who are challenging the law. Indeed, in the *Thompson* and *L'Hommedieu* cases, that issue was decided in accord with the view here expressed by appellants. Mr. Justice Schirek (196 N. Y. Misc. 686) ruled that Education Law § 3021 was vague because the terms "treasonable" and "seditious" were, in common usage, the equivalent of "subversive". And he quoted a statement by Mr. Justice Jackson made when he was Attorney General concerning the vagueness of that expression (see Jurisdictional Statement in No. 312 at pp. 68-70). Moreover, the point was pressed by appellants in their briefs in the New York Court of Appeals.*

The argument that decision by this Court should await interpretation by the state courts fails because the words used are susceptible of no limiting judicial construction which would give to § 3021 any scope not covered by Civil Service Law § 12-a.

b. Appellee briefly suggests (p. 38) that the word "treasonable" has a definite meaning because the United States Constitution (Art. III, §3) and the penal Law of New York (§ 2380) both define "treason". In substance the two definitions coincide and refer only to things done in time of war or attempted rebellion.

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* That is recognized by the Attorney General in his brief amicus (A. G. p. 33).

Surely the ordinary understanding of "treasonable" is much more extensive and involves betrayal of a trust. Its equivalent (according to Webster) is "seditious"; its antonym "loyal". That is the sense in which the epithet was used, for instance, by Mr. (now Judge) Murphy in his summation in the *Hiss* case.

If, therefore, § 3021 is limited to the concept of treason in the Constitution, it adds nothing to Civil Service Law § 12-a. And if not so limited, its meaning is beyond confinement by judicial standards.

c. The same observations apply, with even greater force, to the word "seditious". Appellee (pp. 38-40) argues that this should be so defined as to equate with the crimes specified in 18 U. S. C. 2384, 2385, and New York Penal Law § 161. If so, we are back where we started.

But, of course, the term "seditious" covers a much wider field than is described in these statutes. While it includes the concept of revolt (as stated in the definitions cited on p. 39), it also includes the concept of "exciting to discontent against the government". The extent to which this concept was carried in prosecutions under the Sedition Act of 1798 * should be a warning against permitting such a word to be the measure of anyone's qualifications to teach.

Seditious, like subversive, is an epithet directed at what is unorthodox in politics—often at what later becomes accepted. As Professor Chafee has said, "the victims of state trials are frequently the precursors of statesmen"—and he gives a long list of instances (Free Speech in the United States, p. 515).

The suggestion (p. 40) that a teacher is unfit who seeks to incite to violence or obstructs the lawful processes of government is beside the point. The statute reaches also the teacher who is expounding advanced ideas—unfortunately there are many who would disqualify teachers on that score, but surely this Court will not give such an attitude its sanction.

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* The story has just recently been retold by Prof. John C. Miller in Crisis in Freedom.

d. A final word about a comment made by appellee (p. 40), echoed by the Attorney General in his brief amicus (A. G. p. 34), that since this is not a criminal statute there is no need for precision. Reference is made to the *Douds* (339 U. S. 382, 409, 412-413) and *Dennis* (341 U. S. 494, 515, 516) cases. There is no comparison between the disqualification of a person to teach involved in the Feinberg Law and the disqualification to be a union officer involved in the Taft-Hartley Law. Nor is there any comparison with the scope of the words used. Here, moreover, the only possible precise meaning which might be given to the challenged section equates it with a section not challenged on the score of vagueness. To strike down § 3021, therefore, would not leave the state without remedy.

CONCLUSION

All of this highlights the basic unconstitutionality of the statute. For by the power to list the Regents are given a power over organizations wholly incompatible with the principles of our democracy. No one need suppose that this power will be confined to school employees. If here sustained it will no doubt be extended to all public employees—and not in the State of New York alone.

It may be said that the damage has already been done by the lists put out by the United States Attorney General and other groups (see Appendix, Palmer, The Communist Problem in America). Certainly the uses to which these lists have been put by publications such as Red Channels should give pause to those who value freedom. But because harm has already been done is no reason for this Court to give its approval to its continuation and expansion.

Respectfully submitted,

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